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No. 71

In the Supreme Court of the United States

OCTOBER TERM, 1955

LONNIE AFFRONTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	5
Argument:	
Where a sentence of consecutive terms on multiple counts is imposed, the court's power to suspend sentence and grant probation ends when service of sentence for the first such term begins	10
A. The decision of this Court in *United States* v. *Murray* is controlling	12
B. The language of the probation statute, as amended subsequent to the *Murray* decision, in its context in the Criminal Code, reinforces the conclusion that probation cannot be granted after service of any part of a sentence has commenced	16
C. The considerations which led this Court in *Murray* to conclude that probation could not be granted after service of sentence had begun require the same result regardless of the type of sentence imposed	22
Conclusion	30

CITATIONS

Cases:	
Cosman v. *United States*, 203 U. S. 617	16
Dimmick v. *Tompkins*, 194 U. S. 540	18
Frad v. *Kelly*, 302 U. S. 312	16
Kirk v. *United States*, 185 F. 2d 185	10, 17

Cases—Continued

	Page
Mann v. *United States*, 218 F. 2d 936	8, 11, 19, 26, 28
Mouse v. *United States*, 14 F. 2d 202	11
Phillips v. *United States*, 212 F. 2d 327	8, 11, 15, 18, 19, 20, 24, 27
Stern v. *United States*, 219 F. 2d 263	11
Ex Parte United States, 242 U. S. 27	22
United States v. *Benz*, 283 U. S. 304	19
United States v. *Bernett*, 123 F. Supp. 841	28
United States v. *Cook*, 19 F. 2d 826	20
United States v. *Murray*, 275 U. S. 347	5–8, 10, 12–15, 22, 26, 29
United States v. *Soeder*, 120 F. Supp. 594	8, 11, 25
White v. *Steigleder*, 37 F. 2d 858	10

Statutes:

Probation Act of 1925, 43 Stat. 1259	12, 16, 17
18 U. S. C. 3651	2, 5, 16, 17
18 U. S. C. 4161	19
18 U. S. C. 4202	18

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 35	19
Federal Rules of Criminal Procedure with Notes and Institute Proceedings (N. Y. U. School of Law, 1946), p. 207	19
H. Rep. No. 1377, 68th Cong., 2d Sess.	23
Webster's New International Dictionary, Unabridged (Second edition)	5, 16

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 19–21) is reported at 221 F. 2d 150. The order of the district court (R. 13–14) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1955 (R. 22). The petition for a writ of certiorari was filed on May 12, 1955, and granted on June 6, 1955 (R. 23). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, after a sentence of consecutive terms on multiple counts of an indictment has been imposed and service of sentence for the first such term has commenced, a district court may, under 18 U. S. C. 3651, suspend sentence and grant probation as to the unserved term or terms.

STATUTE INVOLVED

18 U. S. C. 3651 provides:

> § 3651. *Suspension of sentence and probation.*
>
> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation. (June 25, 1948, ch. 645, 1, 62 Stat. 842.)

STATEMENT

The indictment in this case was filed on January 21, 1932 (R. 1), and charged petitioner in ten counts with selling narcotics. In 1937 he was arrested in the State of New York and charged with carrying a concealed weapon (R. 11). Upon conviction, he was sentenced to serve a term of seven to fourteen years, which sentence was served in five years (R. 11). This was followed by a federal sentence of one to three years for posses-

sion of narcotics for which petitioner was indicted and convicted while in the penitentiary in the State of New York (R. 11).

Upon completion of the latter sentence, petitioner was released to the authorities of Ray County, Missouri, where he was convicted of second degree murder and sentenced to ten years (R. 11, 12).

While in Missouri State Penitentiary, petitioner was released on a writ of habeas corpus ad prosequendum to be tried on this ten-count indictment for selling narcotics (R. 12, 17). On January 24, 1944, a jury found him guilty on counts two to ten (R. 6). He was sentenced to five years on each count to be served consecutively (R. 6, 17), and to commence at the expiration of the sentences he was already serving in Missouri (R. 7, 17). Execution of sentences imposed on counts six to ten was suspended at the time of sentencing, and probation granted as to them to begin at the expiration of sentences imposed on counts two to five (R. 7, 17).

Petitioner began serving his federal sentence on October 13, 1949 (R. 12). On July 14, 1953, while serving the sentence on count two, he applied for suspension of sentence on counts 3, 4, and 5 and probation (R. 11, 12). His request was denied by the district court on the ground that it had no power under the circumstances to grant probation (R. 14). On appeal, the order was affirmed (R. 21).

SUMMARY OF ARGUMENT

The Federal Probation Act, 18 U. S. C. 3651, grants to federal courts the power "Upon entering a judgment of conviction" to "suspend the imposition or execution of sentence and place the defendant on probation." In *United States* v. *Murray*, 275 U. S. 347, this Court held that the power of the court to grant probation to a defendant sentenced under a general sentence ended once the defendant had begun to serve his sentence. The issue in this case is whether the courts have the power, where a sentence to consecutive terms is imposed, to suspend sentence and grant probation after the defendant is committed to prison but before he has begun to serve the sentence on the term in question. It is the Government's position that the power of the courts to grant probation ends once the service of sentence has begun, and that it makes no difference whether the sentence imposed be a general sentence or a sentence to consecutive terms on multiple counts.

This result is suggested by the language of the statute. "Upon," according to Webster, means "coinciding with or following the time of," "with little or no interval after." The language "upon entering a judgment of conviction" thus denotes immediacy. It would require a strained construction to hold that nine years after entering judgment, as in the instant case, the court had the power to suspend execution of the sentence and grant probation.

It is to be noted that the language of the present statute, which was amended in connection with the incorporation of the Probation Act into the 1948 Criminal Code, is more specific as to time than was the 1925 Act which was before the Court in *Murray*. The earlier Act conferred the power on district courts to grant probation "after conviction." While it is clear from the revisers' notes that no change in the law with respect to the time of granting probation was intended, it appears that the revisers and the Congress understood this Court's decision in *Murray* to mean that probation must be granted "Upon entering a judgment of conviction," and not at any time after service of the sentence imposed by the judgment had begun.

Our contention that a sentence to consecutive terms on multiple counts should be considered the same as a general sentence, once the defendant has been committed to the custody of the Executive branch, is buttressed when the Probation Act is considered in context in the Criminal Code. The provisions relating to parole and good-time allowances require that consecutive terms on multiple counts be considered the same as a general sentence for the same length of time. Nothing in the Probation Act suggests that it was intended to deal with the release from prison of a person confined in the execution of a judgment, or to empower a court to set at naught

the limitations and restrictions of the parole and commutation statutes.

Moreover, it would be unfair and unjust to make the exercise of the power to grant probation depend upon the type of sentence the prisoner was serving. There is little uniformity in the forms of sentences courts impose. Some prefer general sentences; others, sentences to consecutive terms. To maintain uniformity in the treatment of prisoners after commitment, the two types of sentences should be considered of the same effect as they are in the case of parole and good-time allowances.

Our position finds support in the considerations deemed controlling by this Court in *Murray* in holding that the power of district courts to grant probation ended once the defendant commenced service of his sentence.

The Court in *Murray* noted that the dominant purpose of probation was to provide a method whereby youthful and first offenders could be punished without suffering the ostracism of imprisonment. The proponents of the legislation had stressed that it was far easier to reclaim an unhardened early offender without commitment to a prison than after it. The question of probation was deemed to arise at the time of sentencing and was not intended as a means of shortening the sentence of an offender once committed. To sanction the use of probation to release peti-

tioner from prison after nine years of confinement, as petitioner suggests, would thus be inconsistent with the basic purpose of the probation legislation.

Secondly, the Court reasoned in *Murray* that it should not be assumed that Congress in the Probation Act intended to create a judicial remedy applicable to persons in the custody of the Executive which intruded upon and overlapped the Executive power to pardon or parole. The problem of overlapping responsibility is of course the same whether the prisoner is committed under a general sentence or under a sentence of consecutive terms. Cases of the latter class which have arisen illustrate situations where petitions by the prisoners concerned for release from prison had previously been rejected by the parole or pardon authorities. *Phillips* v. *United States*, 212 F. 2d 327 (C. A. 8); *United States* v. *Soeder*, 120 F. Supp. 594 (N. D. Ill.). The Court of Appeals for the Fourth Circuit has suggested that it "would manifestly be confusing and disruptive of prison discipline to allow both the courts and the executive department to deal with punishment." *Mann* v. *United States*, 218 F. 2d 936, 939.

Finally, this Court in *Murray* stressed that it should not unnecessarily assume that Congress intended to impose additional work on the district courts by requiring them to consider applications

for probation long after convicts had been out of the jurisdiction of the court. This consideration, of course, has precisely the same force regardless of the type sentence defendant is serving. As stressed by the courts which have since considered the matter, an important aspect of this consideration arises from the fact that the information which bears on the merits of an application for probation by a prisoner would be peculiarly within the knowledge of the Executive authorities vested with the responsibility for granting parole or pardon. Thus, in this case petitioner's application was brought nine years after commitment, before a judge totally unfamiliar with the case and the offender, and the merits of the application turn largely on the prison record of petitioner and on his developing personal character, matters peculiarly within the competence of the parole authorities.

We conclude that Congress provided that probation should be granted at the time of sentencing and before service of any part of the sentence has commenced, when the judge who tried the case has at hand the information to exercise the discretion granted him by law. Thereafter, under the statutory scheme, the question of release of the prisoner from custody is the responsibility of the Executive branch.

ARGUMENT

WHERE A SENTENCE OF CONSECUTIVE TERMS ON MULTIPLE COUNTS IS IMPOSED, THE COURT'S POWER TO SUSPEND SENTENCE AND GRANT PROBATION ENDS WHEN SERVICE OF SENTENCE FOR THE FIRST SUCH TERM BEGINS

In *United States* v. *Murray*, 275 U. S. 347, this Court held that once a prisoner had entered upon service of a sentence, a court was without power to grant probation as to that sentence. Hence, as to a general sentence on multiple counts, the beginning of service of the sentence marks the limit of time within which a court may grant probation. That decision, of course, also settles the question as to concurrent sentences upon multiple counts since the day sentence starts on the first count, it starts on all the others.

Where, however, a sentence of consecutive terms is imposed on several counts of an indictment, a division of opinion has arisen as to the time within which probation may be granted. The Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185, and the Tenth Circuit, *obiter dictum*, in *White* v. *Steigleder*, 37 F. 2d 858, 859, treat a sentence to consecutive terms as a series of sentences and hold that the power to suspend sentence and grant probation may be exercised on any count, at any time before service of the period of imprisonment on such count has com-

menced.[1] The Eighth Circuit in the instant case and in *Phillips* v. *United States*, 212 F. 2d 327, the Fourth Circuit in *Mann* v. *United States*, 218 F. 2d 936, and a district court in the Seventh Circuit, *United States* v. *Soeder*, 120 F. Supp. 594 (N. D. Ill.), treat the several consecutive terms in the aggregate for purposes of probation and hold that the court's power to suspend sentence and grant probation ends when the defendant is committed to the custody of the Executive branch and starts to serve any portion of his total sentence.[2]

It is the Government's position that the view of the Eighth and Fourth Circuits is the correct one under this Court's decision in the *Murray* case. This view is supported by the language and purpose of the probation statute. It is, moreover, a reasonable and practical interpretation of the statute in that it reconciles all the provisions for relief and release of federal prisoners—probation, parole, commutation and executive clemency—so as to eliminate confusing overlap between judicial and executive functions.

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[1] In the past the Department of Justice, without consideration of the point of law involved, has at times acquiesced in the suspension of sentence and grant of probation to prisoners after commitment with respect to terms they had not yet begun to serve.

[2] See also *Stern* v. *United States*, 219 F. 2d 263, 265 (C. A. 4); *Mouse* v. *United States*, 14 F. 2d 202 (D. Kans.).

A. THE DECISION OF THIS COURT IN *UNITED STATES* v. *MURRAY* IS CONTROLLING

In *United States* v. *Murray*, 275 U. S. 347, this Court construed the Probation Act of 1925, 43 Stat. 1259, which provided in pertinent part: "That the courts of the United States * * * shall have power, after conviction or after a plea of guilty or nolo contendere * * * to suspend the imposition or execution of sentence and to place the defendant upon probation * * *." That language is, on its face, broader than the present statute which confers the power to grant probation "[u]pon entering a judgment of conviction." Nevertheless, this Court, although recognizing that a broader construction was possible, held (*id.* at 356–357) that it was in keeping with the Congressional purpose to construe the statute to mean that the power of a district court to grant probation ended once a person sentenced to imprisonment had begun to serve his sentence:

> The Probation Act gives power to grant probation to a convict after his conviction or after a plea of guilty, by suspending the imposition or suspending execution of the sentence. This probation is to be after conviction or plea of guilty. The question is—Before what time must it be granted? Two answers to this latter question are possible. It must either be grantable at any time during his whole sentence or be limited to a time before execution of the sentence begins. If the first answer is adopted, it would confer very comprehensive power on

> the district judges in the exercise of what is very like that of executive clemency in all cases of crime or misdemeanor. It would cover in most cases the period between the imposition of the sentence and the full execution of it. It will cover a period in which not only clemency by the President under the Constitution might be exercised but also the power of parole by a Board of Parole abating judicial punishment to the extent of two-thirds of it as to all crimes punishable by imprisonment for more than one year. It seems quite unlikely that Congress would have deemed it wise or necessary thus to make applicable to the same crimes at the same time three different methods of mitigation.
>
> Nor can we suppose that Congress would wish to grant such extended power in all but life and capital cases to the district judges and thus subject each to the applications of convicts during the entire time until the full ending of the sentences. This would seem unnecessary for the hard worked district judges with their crowded dockets. A more reasonable construction is to reconcile the provisions for probation, parole and executive clemency, making them as little of a repetition as we can.
>
> * * *

The Court reviewed the legislative history of the 1925 Act (275 U. S. at pp. 354–356) and found that the dominant purpose of Congress in granting probation powers to the federal courts was to

enable them at the time of sentencing to impose a punishment suitable to the youthful or first offender, not to shorten the term of imprisonment. Thus it found that it was not the purpose of the statute to free a prisoner once incarcerated to whom parole, commutation and executive clemency already applied (*id.* at 357–358):

> The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. * * * The avoidance of imprisonment at the time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. Probation was not sought to shorten the term. * * *

Accordingly, the court held that the words "shall have power, after conviction or after a plea of guilty or nolo contendere, * * * to suspend the imposition or execution of sentence and to place the defendant upon probation" meant that the placing of the defendant upon probation was to follow the suspension of sentence, "without an interval of any part of the execution." That, the Court said, was "a reasonable construction and serves the well understood purpose of the statute." (*Id.* at 358.)

The *Murray* decision covered two cases, *United States* v. *Murray* and *Cook* v. *United States*. Murray had served one day of a three-months'

sentence for violation of the National Prohibition Act when the sentencing court placed him on probation.[3] Cook had served three and one-half years of a sentence totalling fourteen years and nine months[4] imposed upon twelve counts charging mail fraud, for which the maximum sentence on any one count was five years. It is perhaps significant that the Court did not suggest that there was any difference in the power of the court to grant probation whatever the form of the sentence. The focal point of the Court's decision was rather that the power to grant probation under the statute did not survive the beginning of imprisonment. As we spell out at pp. 22–29, *infra*, the rationale of the decision leads inescapably to the conclusion that the same result follows whether the defendant be sentenced under one count; or to a general term or concurrent terms on multiple counts; or to consecutive terms on multiple counts, as in the instant case.

[3] In fact, Murray had been sentenced to three months imprisonment on each of six counts, the terms to run concurrently. Record in *United States* v. *Murray*, 275 U. S. 347, No. 394, O. T. 1927, p. 6.

[4] It appears that Cook was in fact sentenced to consecutive terms, to wit, to five years upon each of the first three counts, to be served concurrently, followed by 13 months' imprisonment on each of the remaining nine counts, to be served consecutively. See *Phillips* v. *United States*, 212 F. 2d 327, 332 (C. A. 8). The sentence was described to this Court, however, as though it were a general one for "a total of fourteen years and nine months." See 275 U. S. at 351; Record in *Cook* v. *United States*, No. 539, O. T. 1927, p. 1.

terms are considered together in the aggregate as a general sentence. But if by judicial construction a power is found to have been placed in the courts to reach persons in the custody of the Executive and grant probation, a possibly conflicting overlap in jurisdiction will be created.

This factor was stressed by Judge Sanborn in his decision for the majority in *Phillips* v. *United States*, 212 F. 2d 327 (C. A. 8). The defendant in that case was serving the third of five consecutive terms at the time he applied for probation. He had already sought and been denied parole by the parole authorities. He then turned to the district court and sought release on probation for the terms which he had not yet begun to serve. The Court of Appeals for the Eighth Circuit concluded that Congress could not have intended to confer on the courts power, in effect, to overrule the parole authorities and grant probation to a person then imprisoned. The court said (212 F. 2d at 330):

> In dealing with the problem involved in this case, it must be kept in mind that the law by virtue of which the District Courts have power to suspend the imposition or execution of sentences and place defendants on probation is no longer an isolated statute but a part of a comprehensive and orderly revision of all of the statutes relating to federal crimes and criminal procedure. The revision of Title 18 of the United States Code included not only the

> law relating to probation but also the law pertaining to executive procedures for the relief or release of federal prisoners, including good time allowances and parole. This carefully prepared and complete revision of Title 18 of the United States Code was enacted by Congress on June 25, 1948, 62 Stat. 683–868. Those who drafted the revision and those who enacted it certainly intended that the functions of the judiciary under Chapter 231 of Title 18 U. S. C., 62 Stat. 841, relating to probation, should not overlap or conflict with the functions of the Attorney General and the Director of the Bureau of Prisons with respect to the custody of federal prisoners and good time allowances under Chapter 309, Title 18 U. S. C., 62 Stat. 853, or the functions of the Board of Parole under Chapter 311, Title 18 U. S. C., 62 Stat. 854, or the powers of the President relative to executive clemency.

Compare the situation in *United States* v. *Soeder*, 120 F. Supp. 594 (N. D. Ill.), where it appears that a prisoner serving a sentence of five consecutive terms sought the suspension of the last three such terms and probation. In holding that he was without power to grant the petition (p. 597). Judge Campbell referred to the fact that Soeder was "imprisoned in an institution governed and maintained by the Executive, not the courts, and the Executive is better qualified than any court to grade petitioner's behavior," and added:

> The facilities which contribute to intelligent decisions, such as the comprehensive reports of the Probation Officers, are not available after the defendant is delivered to prison. He is then supervised and guided by persons responsible to the Executive, and responsibility for his behavior properly shifts from the court to the Executive. This division of power has worked well, and the court will not disturb it now * * *

The Court of Appeals for the Fourth Circuit, in considering the same problem, felt that it "would manifestly be confusing and disruptive of prison discipline to allow both the courts and the executive department to deal with punishment" after the prisoner had been delivered to the Executive branch for punishment. *Mann* v. *United States*, 218 F. 2d 936, 939.

It is important, of course, too, that the parole and pardon officials should know when they have sole responsibility for the relief of prisoners, and when and if that responsibility is shared with the courts.

Finally, this Court in *Murray* stressed that it should not unnecessarily assume that Congress intended to impose additional work on the district courts by requiring them to consider applications for probation long after convicts have been out of the jurisdiction of the court. This consideration, of course, has precisely the same force whether probation be sought with respect to a term then being served, as in *Murray*, or with respect to

subsequent terms imposed at the same time, as in the instant case. In either situation, the problem arises because of the fact that the application for probation might be submitted long after the defendant had been committed. As stressed by the courts which have since considered the matter, an important aspect of the problem stems from the fact that the information which bears on the merits of an application for probation is peculiarly within the knowledge of the executive authorities vested with the responsibility for granting parole or pardon. See Judge Campbell's remarks quoted at pages 25–26, *supra*. Similarly, Judge Sanborn, in *Phillips* v. *United States*, 212 F. 2d at 331, referred to the "superior opportunity" of the Board of Parole to watch the conduct and appraise the character of a prisoner. And Judge Chesnut said in this connection:

> "* * * The district judge has little or no opportunity to learn the conduct and behavior of the prisoner after he begins service of the sentence. On the other hand, the Parole Board does have this opportunity and is much better able to determine whether, upon the expiration of one-third of the sentence, it is consistent with the public interest to release the prisoner from confinement on parole. And in the case of a comparatively long sentence it is quite possible, if the court has the power to suspend part of the sentence at any time during the primary sentence and be-

> fore the beginning of the consecutive sentence, that the application for the suspension would have to be submitted to a judge other than the trial judge in the particular case who would naturally be much more familiar with the case than another judge who is called upon to act in the matter many years later"

United States v. *Bernett,* 123 F. Supp. 841, 846 (D. Md.), quoted with approval in *Mann* v. *United States,* 218 F. 2d 936, 940 (C. A. 4).

The considerations stressed by Judge Chestnut are illustrated by the facts of the instant case. Petitioner was sentenced by Judge Collet in 1944. His application for probation was made nine years later. It has necessarily been brought before a different judge because the sentencing judge is no longer on the district bench, having been appointed to the Court of Appeals for the Eighth Circuit in the interim. This means that the matter came before a judge totally unfamiliar with the case and the offender. Moreover, the merits of the application depended largely on the prison record and developing character of petitioner, peculiarly within the knowledge and special competence of the parole authorities. We submit that Congress provided for the establishment of boards of parole for the purpose of considering the wisdom of early release of prisoners then in confinement, and that this court was correct in

Murray in assuming that Congress could not have intended the Probation Act to place an overlapping responsibility in the district courts.

In short, all the considerations which led this Court in the *Murray* decision to conclude that the power to grant probation "after conviction" did not extend beyond the time when a prisoner started to serve his sentence apply whether the sentence is imposed on a single count, or is a general, concurrent, or cumulative sentence on multiple counts. They apply with even greater force at the present time when the statute requires that probation be granted "Upon entering a judgment of conviction." The time for granting probation is the time of judgment and before service of any part of the sentence has commenced, when the judge who tried the case has at hand the information required to exercise the discretion granted him by law. Thereafter, under the statutory scheme, the question of release of the prisoner from custody is the responsibility of officers of the Executive branch.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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SEPTEMBER 1955.

B. THE LANGUAGE OF THE PROBATION STATUTE, AS AMENDED SUBSEQUENT TO THE *MURRAY* DECISION, IN ITS CONTEXT IN THE CRIMINAL CODE, REINFORCES THE CONCLUSION THAT PROBATION CANNOT BE GRANTED AFTER SERVICE OF ANY PART OF A SENTENCE HAS COMMENCED

The Probation Act empowers district courts to suspend sentence and grant probation "Upon entering a judgment of conviction." 18 U. S. C. 3651. "Upon," according to Webster, means "coinciding with or following the time of," "with little or no interval after." The language thus denotes immediacy. It would require a strained construction to hold that nine years after entering the judgment, as in the instant case, a court had the power to suspend execution of the sentence and grant probation.

The phrase "Upon entering" may be contrasted with the language contained in the Probation Act of 1925, which was before this Court in the *Murray* decision. The 1925 Act conferred the power on district courts to grant probation "after conviction." The ambiguity under the 1925 Act as to the time before which probation must be granted was settled by the *Murray* decision. The Act was amended in 1948 in connection with its incorporation into the Criminal Code. The phrase "Upon entering a judgment of conviction" was inserted, and the words "after conviction" were deleted.[5] It is clear from the revisers' notes

[5] In accord with the practice of the federal courts, which was approved by the Court in *Frad* v. *Kelly*, 302 U. S. 312, 315, and *Osman* v. *United States*, 303 U. S. 617, the codifiers also added the clause "Probation may be limited to one or

that no change in the law with respect to the time of granting probation was intended," which suggests that the revisers and the Congress understood this Court's decision in *Murray* to mean that probation must be granted "Upon entering a judgment of conviction," and not at any time after service of the sentence imposed by the judgment had begun.

It should be noted further that both the original and the amended probation statutes confer the power to "suspend * * * sentence." The fact that the singular rather than the plural form of the word "sentence" is used buttresses our contention that a sentence of consecutive terms on multiple counts should be considered for present purposes the same as a general sentence, for obviously the probation statute has equal application to a judgment imposing consecutive sentences as to one imposing a general sentence on multiple counts,

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more counts or indictments" to the original Probation Act's provisions. This appears to be an extension of the original concept of probation as a relief from *any* imprisonment. While, as petitioner argues (Br. 10), it thus appears that consecutive sentences imposed on separate counts of the same indictment may be considered separately for the purpose of the granting of probation "[u]pon entering a judgment of conviction," it does not follow, for reasons spelled out in this brief, that they may be so considered once service of sentence under the judgment has commenced and defendant has been committed to the custody of the executive branch.

[*] See *Kirk* v. *United States*, 185 F. 2d 185, 188 (C. A. 9). For this reason it would appear that district courts, as held in *Murray*, have the power under the amended act to grant probation at any time prior to the time service of sentence is commenced.

Our contention that a sentence to consecutive terms on multiple counts should be considered the same as a general sentence, once the defendant has been committed to the custody of the executive branch, is also buttressed when the Probation Act is considered in context in the Criminal Code. The Probation Act is a part of a comprehensive code covering federal crimes and the administration of criminal justice. See *Phillips* v. *United States*, 212 F. 2d 327, 330 (C. A. 8). It is significant that, with respect to matters relating to custody and parole, the Code uniformly requires that the total sentence imposed under a judgment of conviction, including a sentence to consecutive terms on multiple counts, be considered in the aggregate as a single sentence of imprisonment.[7] Thus, for purposes of parole, the one-third of the time to be served, after which the prisoner becomes eligible for parole, is that of the "term or terms" for which the offender is confined. 18 U. S. C. 4202.[8] Similarly, good-

[7] Of course, the question whether consecutive terms are to be considered separately or in their totality depends upon the context in which the question arises. See *Dimmick* v. *Tompkins*, 194 U. S. 540, 541. We have seen that in imposing sentence the trial court may impose imprisonment as to some counts and grant probation as to others. See p. 16, fn. 5, *supra*. Similarly, for purposes of review, each count is necessarily considered separately since the evidence as to each count is different.

[8] § 4202. *Prisoners eligible.*

"A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving

time allowances are computed on the basis of the aggregate of the terms to be served. 18 U. S. C. 4161.[9] Thus it appears from its context that Congress considered that, for purposes of custody, consecutive terms on multiple counts should be considered the same as a general sentence for the same length of time.[10]

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a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving *one-third of such term or terms or* after serving fifteen years of a life sentence or of a sentence of over forty-five years." Acts of June 25, 1948, ch. 645, § 1, 62 Stat. 854; July 31, 1951, ch. 277, 65 Stat. 150. [Emphasis added.]

[9] "When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed." Act of June 25, 1948, c. 645, § 1, 62 Stat. 853.

[10] Rule 35, Federal Rules of Criminal Procedure, provides that the court "may reduce a sentence within sixty days after the sentence is imposed * * *" The notes of the advisory committee indicate that this provision was intended to introduce a flexible time limitation on the power of the court to reduce a sentence, in lieu of the former limitation of the term of court. See *United States* v. *Benz*, 282 U. S. 304. While the federal rules made no change in the *Murray* rule as to the time within which a court retained the power to suspend a sentence and grant probation (see Federal Rules of Criminal Procedure with Notes and Institute Proceedings (N. Y. U. School of Law, 1946), p. 207), Rule 35 may properly be taken as indicating a general policy as to the time within which a criminal case, after conviction, should be finally disposed of by a district court. See *Phillips* v. *United States*, 212 F. 2d 327, 334 (C. A. 8); *Mann* v. *United States*, 218 F. 2d 936, 939 (C. A. 4).

It would appear that, for present purposes, consecutive terms on multiple counts should similarly be considered the equivalent of a general sentence. If the Probation Act were construed to authorize a court to order the release of a prisoner confined under a sentence consisting of consecutive terms with respect to terms as to which service had not yet commenced, the court could "set at naught the limitations and restrictions of the parole and commutation statutes, leaving the system established by those statutes in force only so far as [the court] in the exercise of an unrestricted discretion, may permit it to remain in force." *United States* v. *Cook*, 19 F. 2d 826, 828 (C. A. 5), affirmed, *United States* v. *Murray*, 275 U. S. 347. Nothing in the Probation Act suggests that it was intended to deal with the release from prison of a person confined in the execution of a judgment, or that it "changed, modified, or to any extent repealed or superseded the statutes dealing with that subject." 19 F. 2d at 828.

Moreover, if the power to grant probation to a federal prisoner as to unserved parts of a sentence were to be conferred on the district courts, it would be "both unsound and unjust to make the exercise of the power depend upon the type of sentence the prisoner was serving. There is little uniformity in the forms of sentences which courts impose." *Phillips* v. *United States*, 212 F. 2d at 335. In determining the total time to be

served by a defendant, the trial judge necessarily considers all the counts upon which the offender has been found guilty. One judge may sentence the offender to one year on three counts, to run consecutively. Another judge may frame the same sentence as a general one for three years. Still another judge may sentence the offender to three years on each count, to run concurrently. Regardless of the form of the sentence, the inescapable fact is that each judge has sentenced the offender to three years. Each offender will come up for parole at the same time and be eligible for good-time allowances at the same rate. The fact that separate sentences were imposed by two of the judges on the several counts has no significance as related to probation.

To maintain the uniformity of treatment of prisoners after commitment, a sentence to consecutive terms should be considered in its totality. Otherwise, the offender who received a sentence of consecutive terms is placed in a preferred position with respect to probation over those equally culpable offenders whose sentencing judges happened to use a general or concurrent type sentence for the same length of time. There is no indication that Congress intended that prisoners sentenced to consecutive terms should be eligible for probation on each such term until such time as they begin to serve the term. There are enough vagaries in sentencing without introducing another by interpreting the probation statute so as to bring about this anomalous result.

C. THE CONSIDERATIONS WHICH LED THIS COURT IN *MURRAY* TO CONCLUDE THAT PROBATION COULD NOT BE GRANTED AFTER SERVICE OF SENTENCE HAD BEGUN REQUIRE THE SAME RESULT REGARDLESS OF THE TYPE OF SENTENCE IMPOSED.

Our argument that the duration of the court's power to grant probation under the Probation Act is the same, whatever the type of sentence imposed, finds support in the considerations deemed controlling by this Court in holding that the power of district courts to grant probation ended once the defendant commenced service of his sentence. We have seen that in *Murray* this Court stressed three considerations: (1) that the dominant purpose of probation was to provide a method whereby defendants, such as repentant youthful or first offenders, could be punished without suffering the ostracism of imprisonment;[11] (2) that it should not be assumed that Congress in the Probation Act intended to create a judicial remedy applicable to persons in the custody of the Executive which intruded upon and overlapped the executive power to pardon or parole; and (3) that it should not be assumed that Congress intended to subject hard-worked district judges to applications for parole during the entire time convicts were in custody. Each of these considerations has equal force in support of our position in the instant case.

[11] It had been held prior to the Probation Act that district courts had no power to suspend sentences. *Ex parte United States*, 242 U. S. 27. See *United States* v. *Murray*, 275 U. S. at 354.

Probation deals with the situation existing at the time of sentencing. As the proponents of the legislation stressed before Congress, "The result of long experience with the probation system shows that it is far easier to reclaim an unhardened early offender without commitment to a prison than after it." See H. Rep. No. 1377, 68th Cong., 2d Sess., p. 4. What was needed was a form of punishment which would enable the court to avoid imposing a term of imprisonment in suitable cases while keeping the offender under the supervision of the court. It was not the function of probation to shorten the sentence of an offender once committed. See 275 U. S. at 358. Parole and good-time allowance and executive clemency were available for that purpose when the 1925 Act was passed, and are still available. To treat consecutive terms on multiple counts of an indictment separately and construe the statute so as to permit probation to be granted long after imprisonment had begun would be, in effect, to sanction its use as a means of shortening the sentence. Such a construction would be inconsistent with the basic purpose of the probation legislation.

This construction would also create a region of overlapping authority between the power of the courts to grant probation and the power of the Executive to pardon or parole. As we have seen, for purposes of pardon or parole, consecutive